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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 790

PROVISION SALESMEN AND DISTRIBUTORS UNION, LOCAL 627, APPELLANT

v.

UNITED STATES OF AMERICA, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Preliminary Statement

Appellant (hereinafter sometimes referred to as "Local 627" or "the Union") opposes the motion to affirm and urges that there are substantial issues warranting plenary appellate review by this Court, the only review which the Union can receive in any forum under the direct appeal provisions of the antitrust laws. In the words of Rule 16(1)(c), it is not "manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

If this Court believes, however, that plenary review is unwarranted, we respectfully urge that the judgment below be summarily reversed as clearly erroneous.

The Facts

Contrary to the government's assertions, appellant does not accept either the sufficiency of the evidence to support the district court's findings or the sufficiency of the findings to support the conclusions and ultimate judgment. This, we believe, is clear from the Jurisdictional Statement which casts the issues in factual terms quite different from those embodied either in the findings below or the government's motion to affirm. For example, question No. 3 (J.S. 3)[1] is framed in terms of the owner-drivers' "job and wage competition with admitted employee drivers". The government argues that no such competition exists and that the district court's finding that there was "no legitimate labor objective served through the membership of the distributors in Local 627" (F. 51) is equivalent to a finding of the lack of requisite economic interrelationship. Plainly the existence or non-existence of such economic interrelationship is squarely at issue on this appeal.

It is noteworthy that the three findings on which the government primarily relies (F. 46, 49, 51; see motion p. 8) are the only material findings made below which are not cited at all to the trial record. An examination of the voluminous proposed findings submitted by the government to the district court will also disclose that these three findings were not proposed by plaintiff.[2]

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[1] The references herein to J.S., "F", and "Tr" have the same meaning as in the government's motion. In the case of many findings, the trial court's accompanying citations to the trial record disclose a fuller and more helpful exposition of the pertinent facts than the findings themselves.

[2] The proposed findings were expressly referred to in the opinion below (J.S. 3a) and are a part of the record transmitted to this Court. We recognize that a trial court is not limited to the proposed findings submitted by the parties, but the fact that each of the most crucial findings herein was not included in the extensive, well-cited findings proposed by government counsel is not without significance.

The Economic Functions of the Owner-Drivers and the Extent of Company Control.

The government's motion gives only a partial statement of the pertinent facts. Thus, the Sabrett, Superior and Olympia owner-drivers serviced not only "their own customers", but also house accounts, which were assigned to them by the company and often transferred from a house driver's route to that of an owner-driver. The owner-driver had no say as to the terms of sale or credit to these house accounts and was paid by the manufacturer for servicing them, either through commission or flat salary (F. 24). Even the owner-drivers' "own accounts" were often solicited by the company, which assigned new customers either to a house driver, as a house account, or to an owner-driver, as "his own account" (F. 48).

Sabrett, the largest of the three manufacturers and the only one still in business, actively supervised the lay-out and operation of the owner-drivers' routes, received and processed customer complaints as to the promptness of the owner-driver's deliveries, and re-assigned accounts which the owner-driver did not satisfactorily service (Tr. 702-703, 755, 821, 1307-1317, 1350). In substantial measure the solicitation of new customers for owner-drivers and the defense against competitive assaults on their existing customers was undertaken and performed by Sabrett sales personnel; and, to a somewhat lesser degree, the same was true of Superior and Olympia (Tr. 372-373, 520, 750, 752-755, 759, 794, 906-907, 977-978, 1076-1077, 1319-1323).

The government asserts (motion p. 3) that the owner-drivers set their own terms and conditions of sale to their own customers. But this power was more illusory than real. The uncontradicted evidence shows that the list price promulgated by the manufacturer to its own retail trade in the New York area set the effective maximum which the

owner-driver could charge to his customers, who were located in the very same metropolitan area (Tr. 66, 68-69, 71, 183, 230-231, 348-349, 519, 759).[3] With respect to hours of work, the evidence shows that the working day of both house drivers and owner-drivers was wholly determined by the needs of their customers, for early morning delivery in the case of street peddlers, and for pre-luncheon delivery in the case of other customers. Both house drivers and owner-drivers started work between midnight and 4:00 A. M. and finished deliveries by late morning or afternoon (F. 39; Tr. 58-59, 80, 231-235, 332, 338-339, 706-707, 748, 797, 1398-1399; DU Ex. 116, pp. 7-9). Indeed, there is no dispute that the actual work performed by the two groups was identical, from the initial, daily pick-up at the manufacturer's plant, through the delivery process, and ending with the last stop along a prescribed daily route (F. 16; F. 21).

Each of the three companies permitted the owner-drivers to return unsold merchandise for credit, at the end of the day or week, so that the risk of inability to sell remained that of the manufacturer. Some owner-drivers with refrigerated trucks chose to keep their unsold merchandise overnight so as to avoid a return trip to the plant, and house drivers with refrigerated trucks did the very same thing (F. 41; Tr. 1395, 1419-1420).

The owner-drivers neither manufactured, stored nor warehoused any product. Their sole economic function was to pick up frankfurters and rolls each morning and deliver them daily from the processor's plant to the customers on their route.

Many of these facts, and others demonstrating an employer-employee relationship for Sherman Act purposes

[3] We think it fair to state that there is no material contradiction or dispute in the trial record as to the facts pertinent to this appeal.

are set forth in the findings below (E.g. F. 24, 25, 26, 27, 28, 29, 41, 48). On some significant aspects of the relationship, the court simply failed to make any findings, although such findings were proposed by the Union and established by uncontradicted evidence.

Although "distributors" operated as partnerships and corporations, there is no issue in this case as to any man who did not actually drive a truck regularly in the delivery of frankfurters (Tr. 16-18). There was neither evidence nor finding of any attempt to set a minimum discount for any "distributor" who did not drive a truck. The documentary and testimonial evidence established that the term used in the collective agreement was "agent-driver", not "distributor" (Tr. 1450, Pltf. Ex. 3).

The Economic Interrelationship Between the Owner-Drivers and Unionized House Drivers.

The record herein establishes no less than three separate admitted employee-driver groups in "job or wage competition or some other economic interrelationship" with the Sabrett, Superior and Olympia owner-drivers. These are:

1. *The house drivers employed by other frankfurter manufacturers in direct competition with the three corporate defendants.* Throughout the period involved, Sabrett, Superior and Olympia were in intense competition with other provision houses employing Local 627 house drivers (Tr. 181, 355-356, 409, 714, 978-979, 1090-1093, 1145-1146, 1222-1249, 1297-1304, 1325-1327, 1390, 1476-1479, DU Exs. 111, 112 and 113). Indeed, Sabrett's sales manager described Hygrade Food Products Corp., an employer of approximately eighty Local 627 drivers, as Sabrett's principal competitor in the sale of frankfurters (Tr. 1325, 1476-1477).

The differential or discount accorded owner-drivers from the manufacturer's list price represents the manufacturer's cost of delivering his product from plant to retailer. For example, a discount of 2¢ per pound from the price at which the processor is prepared to sell (and deliver through house drivers) to his own retail trade means that he has accomplished the delivery of his product through owner-drivers at a cost of only 2¢. To the extent that Sabrett, Superior and Olympia were free to compress the discount to their owner-drivers and thus reduce their distribution costs below those of competitors employing Local 627 house drivers, the defendant corporations enjoyed the competitive advantage of lower labor costs. And since the commission earnings of the Local 627 drivers depended on the volume of sales made by them, Sabrett's ability to cut its distribution costs and thus its ultimate retail price directly threatened the earning capacity of Hygrade's house drivers.[4] Moreover, the job security of Hygrade's drivers was also jeopardized, for Hygrade would naturally seek to regain competitive parity in labor costs by either reducing the drivers' wage scale or converting to a predominantly owner-driver form of distribution.[5]

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[4] For purposes of simplicity, this brief will refer to Sabrett as prototype of the three corporate defendants, and Hygrade, as prototype of competing frankfurter manufacturers employing Local 627 drivers. The same relationship existed between the other two corporate defendants and many other provision houses.

[5] By negotiating a minimum owner-driver discount in 1949 and a further increase in 1956 to keep pace with driver wage increases, Local 627 obviously forstalled some of these dangers, although as indicated in the Jurisdictional Statement and this brief, many competitors of the corporate defendants did in fact convert house drivers into owner-drivers, particularly in the period prior to 1949, and proof to this effect was erroneously excluded below. The significant point is that the economic interrelationship and the threat to employee standards is clear, and a union need not delay its response until all the abuses have already occurred.

2. *The house drivers of Sabrett, Superior and Olympia.* The owner-drivers of each of the three companies competed for customers with the house drivers of the other two (F. 47). In the face of a low owner-drivers' discount by one company, the other two would naturally seek to remain competitive by lowering their own distribution costs, either through reducing the wages of their house drivers or by converting them to owner-drivers.

This is precisely what occurred. Sabrett regularly countered its drivers' wage demands with the threat to convert them into owner-drivers (Tr. 1329-1334). Sabrett also rejected its sales manager's recommendation to establish new house routes on the ground that indirect delivery through owner-drivers was cheaper (Tr. 1328-1329). All three companies, aware that their cost accounting surveys showed distribution costs to be lower through owner-drivers than through house drivers, transferred accounts from house drivers to owner-drivers and converted employees into ostensible "independent contractors" (F. 48; Tr. 654-655, 697, 1387-1389).[6]

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[6] The fact that the house drivers of the corporate defendants were members of another union and not Local 627 is irrelevant. Nothing in the findings or opinion below indicates that the district judge gave any weight to this point, and his comments during trial show that he did not (Tr. 1106). Local 627 represented house drivers and owner-drivers in the provision industry, and the Teamsters locals represented both groups in the baked goods industry. In fact the right of Teamsters Local 802 to unionize and regulate owner-drivers has been upheld by this Court. *Bakery Drivers Union, Local 802* v. *Wohl*, 315 U.S. 760. The three corporate defendants, as producers of frankfurters and rolls, were hybrids and, therefore natural subjects of jurisdictional dispute. The trial court rejected proof that Local 627 and the Teamsters agreed that the Teamsters would represent the house drivers and Local 627 the owner-drivers (Tr. 1481-1483). In any event, Local 627 had a legitimate interest in the maintenance of the wage standards and job security of unionized house drivers in the food industry who were themselves represented by a sister union but who competed with processors employing Local 627 drivers. Moreover,

3. *The employee-drivers of distributor corporations.* These drivers, members of Local 627, were employed by the two or three Sabrett, Superior or Olympia corporate distributors and were thus in regular competition with the individual owner-drivers of the other two manufacturers. Their economic interrelationship with the owner-drivers and the impact on them of the owner-drivers' discount is similar to that of the company house drivers considered above.

Morris Horn, chief negotiator for Local 627, testified without contradiction that the purpose of negotiating a minimum agent-driver discount in 1949 was to control the conversion of house drivers into owner-drivers and to protect the house drivers against "economic jeopardy"; and that he so informed the manufacturers (Tr. 1445-1452). He testified further, also without contradiction, that the 5¢ discount was calculated to achieve "a parity or comparable cost of operation for the agent-distributors as the cost of operating as a route salesman" (Tr. 1457); and this, too, was discussed during the negotiations (Tr. 1452-1458).

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the federal labor laws encourage the peaceful resolution of jurisdictional issues between unions (NLRA §§8(b)(4) and 8(b)(7); 29 U.S.C. §§158(b)(4) and (b)(7)); and it would be inconsistent with this national policy to hold that the representation of the house drivers and owner-drivers of a single employer by two unions leads to a lesser bargaining power under the Sherman Act than would be the case if one union represented both groups. Any such holding would only encourage "all or nothing" jurisdictional warfare.

ARGUMENT

POINT I

Whether the owner-drivers possess sufficient employee characteristics to permit collective bargaining in their own interest is a substantial issue meriting full consideration by this Court.

The Federal Social Security Act defines "employee" as including the following (42 U.S.C. § 410):

"(j) The term "employee" means—

. . . . . .

(3) any individual (other than an individual who is an employee under paragraph (1) or (2) of this subsection) who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services, for his principal;

. . . . . .

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such service (other than in facilities for transportation), or if the services are in the nature of single transaction not part of a continuing relationship with the person for whom the services are performed."

Not only does the reference to "agent-driver . . . distributing meat products" squarely describe the owner-drivers herein, the legislative history shows that Local 627 spearheaded the effort to obtain this inclusion. See testimony of Morris Horn on the Social Security Act Amendments of 1949, Hearings before Committee on Ways and Means, House of Representatives, 81st Cong., 1st Sess., on H.R. 2893, p. 2092, printed as Appendix "A" to this brief.

This Court has held that the scope of the "labor exemption" under the Sherman Act cannot be determined without reference to other federal legislation. *United States* v. *Hutcheson*, 312 U.S. 219. Although the Court has principally spoken of the Clayton Act and Norris-LaGuardia Act in this connection, it would be highly incongruous to ignore the deliberate, carefully-drawn Congressional conferral of employee status upon the very group of workers at issue herein, in an important cognate piece of social legislation.

In discussing the ability of self-employed workingmen to bargain collectively in their own self-interest, apart from economic interrelationship with an admitted employee group, the concurring opinion in *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94, 105 noted:

> "The Court is not here called upon to pass upon, and does not pass upon, the existence of the antitrust violation, or whether as an original matter, the grease peddlers might properly associate among themselves or affiliate with a sympathetic and genuinely interested union to improve their economic condition. Resolution of such issues would require careful and detailed consideration of federal labor policy, the scope of the antitrust exemption afforded labor organizations by §§6 and 20 of the Clayton Act and the Norris-LaGuardia Act, as interpreted by United States v. Hutcheson, 312 U.S. 219, and, in addition, the applicability here

of the doctrines enumerated by this Court in cases such as Columbia River Packers Association, Inc. v. Hinton, 315 U.S. 143 and Allen Bradley Co. v. Local No. 3, 325 U.S. 797"

Should this Court decide the question of economic interrelationship with admitted employees against appellant—which we believe most unlikely—than the issue posed above is squarely presented.

The evidence outlined above, and even the district Court's own findings, show a sufficient degree of employer control and lack of true entrepeneural independence on the part of the owner-drivers to entitle them to associate and take concerted action to improve their own earnings. See also *NLRB* v. *Hearst Publications*, 322 U.S. 111. This is particularly so with respect to the owner-drivers of Sabrett, the only corporate defendant still in business.

POINT II

The economic interrelationship between owner-drivers and unionized house drivers furnishes a legitimate union objective for the collective bargaining provisions found illegal below.

The sole basis of the government's motion to affirm is an asserted "absence of economic interdependence" between owner-drivers and house drivers. Implicit in this argument is an admission that were the requisite economic interrelationship to exist, a collective bargaining provision establishing minimum discounts for owner-drivers would be an appropriate means to safeguard the job and wage security of the interrelated house drivers.[7]

The government's argument misconceives both the state of the evidence and the scope of this Court's decisions on the economic interrelationship that will justify union action. Moreover, the findings below, even if fully supported by evidence, would not justify the conclusion that Local 627 had "no legitimate labor objective".

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[7] The government implicitly concedes, as it must after *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, that the owner-driver discount is in reality a regulation of wages not prices, although this was the main issue presented below. The principal ingredient in the discount is the labor cost of the owner-driver—the discount representing his only compensation for the physical services performed—with the cost of the truck being only a relatively minor factor. Moreover, unlike the agreement in *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283, in which the truck rental price approved by this Court was prescribed separately from the cost of the owner-operator's own services, here a single discount covers both the labor and truck costs. And unlike *Carroll*, there is no question here as to independent contractors who do not themselves perform the same type of physical work as employees, that being the only issue which divided the Court in *Carroll*. Finally, there is no contention, evidence, or finding that the contractual discount figure was set so high as to include entrepreneural profit, and Mr. Horn's uncontradicted testimony as to how the figure was determined establishes that it was not (Tr. 1457-1458).

1. Significantly the trial court neither found nor concluded that there was no "job or wage competition or other economic interrelationship" between the owner-drivers and admitted employee-drivers. Indeed, the court found that the owner-drivers did service house account customers, did compete with manufacturers employing Local 627 house drivers, and did receive routes and customer accounts from their manufacturers who also employed house-drivers as an alternative means of distribution. (F. 15, 24, 27, 48). This, we submit, is more than enough to establish economic interrelationship with the house drivers of the three corporate defendants and other competing provision manufacturers.

As indicated above, the district court failed to find other facts, fully established by uncontradicted evidence, which further demonstrated the extent of this interrelationship. Some, but by no means all,[8] of this evidence is mentioned in footnote 3 of the government's motion (p. 9).

In addition, the court below erroneously excluded evidence that prior to the negotiation of the first owner-driver discount in 1949, a large number of frankfurter manufacturers in competition with the corporate defendants had converted their house-drivers into owner-drivers in order to save labor costs. Although the government motion (pp. 7-8, footnote 3) professes ignorance of the evidence which the Union sought to introduce, the offer of proof at trial was quite clear (Tr. 1424-1431).

The government's further argument that evidence of conversions by competing manufacturers is irrelevant will not stand analysis. The Union introduced in evidence a large

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[8] For example, Frank Goodman testified that Superior converted him from house driver to owner-driver and not only permitted him to keep his former route but also turned over to him a route formerly serviced by another house driver, who was thereupon fired by the company (Tr. 1387-1389).

number of contemporaneous collective agreements with other New York frankfurter manufacturers containing similar "agent-driver discount" provisions, and showing that Sabrett, Superior, and Olympia were not treated in isolation (DU Exs. 3, 4, 36, 45 and 79). It cannot be contended that if 47 out of 50 competing manufacturers convert house drivers into owner-drivers, the Union may not then act to induce the remaining three to refrain from a similar course. *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91. And if the Union is then called to account for its action with respect to these three, its experience with the other 47 competitors is certainly relevant to show the justification for its action and the legitimacy of its objective. That was essentially the situation here; and the evidence of the industry-wide situation faced by the Union was highly relevant and erroneously excluded.

2. The key findings below are not only unsubstantiated, they do not, in any event, support the conclusion of lack of economic interrelationship or legitimate union objective. The court found that in 1946 the owner-drivers sought union membership to attain larger profits, they were not then solicited by the union, and they were not then affecting the welfare of other union members. (F. 44, F. 45, F. 46). Apart from the lack of factual support for these findings,[9] they are entirely irrelevant. For Local 627 did not negotiate the first agent-driver discount

[9] The evidence shows without contradiction, that the owner-drivers joined the Union not for higher profits, but to obtain the benefits of Local 627's welfare program and because their unionized retail customers insisted on delivery through a union driver (Tr. 131-132, 141, 250, 574, 650, 673, 704, 720-721, 749, 821, 860-862, 1480). While Local 627 did not then represent any other Sabrett, Superior, or Olympia agent-drivers, it did represent owner-drivers employed by various provision houses which manufactured and sold frankfurters in competition with the corporate defendants (Tr. 581, 583).

until 1949, three years later (F. 52). In 1946 OPA price and wage regulations were still in effect, and these regulations, apart from any economic competition from owner-drivers, prevented any upward push in house driver wages. By 1949 the OPA restrictions had been lifted. And there is neither evidence nor finding that in 1949 the union was unconcerned about the agent-drivers or that in 1949 they did not represent a threat to the economic interests of unionized house drivers.

In emphasizing the finding that in 1946 the union did not organize the owner-drivers or solicit them into membership (motion pp. 9-10), the government, too, overlooks the crucial sequence of dates. For the trial judge found that by 1949—when the challenged discount provisions were first negotiated—Local 627 successfully sought to have all owner-drivers become union members (F. 55). Indeed, this effort was one of the two types of conduct enjoined below (J.S. 27a).

Finally, the government relies on the finding that the manufacturers did not attempt "to set their employee-drivers and distributors against one another for the purpose of affecting the wages or working conditions of either group" (F. 49). Factually, this finding is incredible in light of the uncontradicted testimony of Sabrett's sales manager that the company regularly used the threat to turn over all deliveries to owner-drivers as a club to keep down the wages of its house drivers (Tr. 1330-1334) or the testimony of owner-driver Frank Goodman that a Superior house route was turned over to him and the house driver fired (Tr. 1387-1389). Indeed, this finding cannot be reconciled with the Court's own finding that the three companies did turn over house routes and house accounts to owner-drivers for servicing (F. 48), a step

which inevitably affected the earnings and job security of the house drivers who had previously serviced these routes and accounts.[10]

Moreover, the government's reliance on this finding, as well as other contentions in its motion, betrays an inadequate appreciation of the scope of this Court's decisions in *Oliver, supra; Carroll, supra; Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc., supra,* and similar cases. For Finding No. 49, even if supported, does not deal at all with the interrelationship between Sabrett's discount to its owner-drivers and the wages and job security of Local 627 house drivers employed by competing processors like Hygrade. Even if Sabrett had no house drivers of its own, such an interrelationship would justify the challenged contract provision. *Aetna Freight Lines, Inc.* v. *Clayton,* 228 F. 2d 384, *cert. den'd* 351 U.S. 950. The Court below made no findings as to the nonexistence of such an interrelationship; and none could be made in light of the overwhelming evidence establishing its existence.

The government seems to argue that the relevant interrelationship between Sabrett and Hygrade could rest only on direct customer competition between a Sabrett owner-driver and a Hygrade house driver. Although the trial

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[10] Equally puzzling is the latter part of Finding No. 50, uncited to the record and not proposed by the government, that the "wage increases [to Sabrett, Superior and Olympia house drivers] were not related in any manner whatever to the activities of Local 627 on behalf of the distributors." Since Local 627 successfully maintained minimum discounts in its collective agreements with these manufacturers from 1949 on, how could the trial court, or anyone else, know what would have happened to house driver wage increases or house driver routes had the companies been free to lower at will the owner-driver discount and thus widen further the known disparity between the costs of indirect and direct delivery?

court found that such competition did exist (F. 47), the decisions of this Court cannot, in any event, be so narrowly read.

The government does not dispute that a low owner-driver discount means lower distribution costs to the manufacturer, as compared to direct delivery through house employees. The economic effects of these diminished costs are not limited to the direct competition between Sabrett owner-driver and Hygrade house driver. For savings effected by Sabrett on this branch of its business could then be utilized to reduce retail prices on its house account business, particularly with very large customers, like Nathan's Famous Frankfurters, where competition is most keen and a slight price reduction might prove decisive. (Tr. 1145-1146, 1224-1232, 1296-1305, 1237; DU Exs. 112 and 113). The acquisition of such customers by Sabrett would substantially impair the commission earnings of the Hygrade house drivers and directly jeopardize Hygrade's ability to support the continued employment of these drivers.

In its *Carroll* decision, quoting from *Mine Workers* v. *Pennington*, 381, U.S. 657, 666, the Court said (391 U.S. at 106):

> "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such activity may be to eliminate competition based on differences in such standards."

In *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504, the Court held that the

> ". . . elimination of price competition based on differences in labor standards is the objective of any

national labor organization, but this effect on competition is not considered to be a violation of the antitrust laws."

This settled principle fully justifies the interest of Local 627 house drivers in a contract provision between their union and competing manufacturers which eliminates potential price inequities based on the difference in labor costs of owner-driver delivery and house driver delivery. The direct competition for customers between the two groups only emphasizes the closeness of the interrelationship.

3. The decision below may be read as holding that even if the requisite economic interrelationship existed, Local 627's "objective" did not fall within the labor exemption because the Union was motivated by a desire to further the interest of the owner-drivers not the house drivers. The government motion to affirm apparently does not seek to defend the decision below on any such basis. In any event, the *Carroll* decision poses an objective not a subjective test (391 U.S. at 108): "The critical inquiry is whether the price floors in actuality operate to protect the wages of the sub-leader and sidemen." To permit a district judge to nullify the labor exemption on the basis of the union's purported subjective motivation, notwithstanding the existence of job and wage competition between independent contractors and unionized employees and a bargaining provision reasonably calculated to protect employee wage standards, would be to cut the heart out of the *Oliver* and *Carroll* doctrine and reintroduce the abuses which led to the enactment of the Clayton and Norris-LaGuardia Acts. Particularly is this so since virtually all union efforts to bring independent contractor

standards up to those of interrelated employees incidentally benefit the independent contractor as well.[11]

The instant case points up dramatically the dangers of the subjective approach. At trial, Mr. Horn testified without contradiction that the Union's purpose in 1949 was to protect the interests of house drivers. It is rare that a litigant, charged with lack of concern about interrelationships and interests protected by the "labor exemption", can demonstrate out of the public record that nearly twenty years ago it had such concern. In this case such a demonstration is possible. For in 1949, the very year in question, Mr. Horn testified before a House Committee on proposed Social Security amendments concerning the owner-drivers: Although there was no occasion for him to discuss the question of discounts or differentials or economic interrelationship as such, his testimony, Appendix "A" hereto, discloses the following:

1. Local 627 was aware of, and concerned about, the employers' "process of converting some or all of their regular route salesmen into the hybrid agent-driver bracket." See *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc., supra; Los Angeles Meat Drivers Union* v. *United States, supra.*

2. Local 627 was concerned about the relationship between owner-driver costs and house driver costs, and knew that the owner-driver provided a cheaper form of delivery.

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[11] The preoccupation in the findings and opinion below with the Union's "objective" in the 1940's also ignores the fact that this 1968 injunction prohibits union action prospectively. There are no findings that the union had no legitimate labor objective in the 1950's or 1960's when the economic interrelationships continued to exist and the challenged contract provisions continued in effect.

3. Local 627 was aware of, and concerned about the effects of the owner-driver system upon "those competing employers who have staunchly assumed their obligations and retained a staff of regular route salesmen alone, instead of taking the easy way out from under a tax burden."

POINT III

The evidence does not establish the union's participation in any conspiracy to fix manufacturers' prices to the retail trade.

Neither the deposition testimony of the deceased president of Olympia nor the hearsay testimony of his son, App. B to the government's motion, supports in any way the finding of Local 627 participation in a price-fixing conspiracy. In substance, both men testified that on a single occasion in 1956 representatives of the three manufacturers came to Mr. Horn's office to negotiate the owner-drivers' discount, that they did negotiate on this subject with Mr. Horn, that Mr. Horn fought hard and successfully for a 3¢ increase in the discount, and that thereafter the three manufacturers' representatives (Papalexis, Gilman and Frankel) agreed upon a common increase in their respective list prices.

There is not a word of testimony that Mr. Horn was a party to the agreement on manufacturers' list prices, that he acquiesced in it, that he said even a single word on the subject, or that this discussion between Papalexis, Gilman and Frankel took place within his hearing or even while he was in the room.[12] The only statements attributed to

[12] The record is replete with testimony of other meetings at Mr. Horn's office in which he was alternately in and out of the room (91-92, 98, 149-150, 212, 256, 258, 265, 321).

Mr. Horn concerned the owners-drivers' discount, a wholly different subject. Nor is there any evidence that Mr. Horn or Local 627 took any subsequent action pursuant to, or in furtherance of, any agreement on manufacturers' list prices.

Finally, there is neither evidence, finding nor contention that on any other of the many occasions on which manufacturers increased list prices over the years, Local 627 displayed any interest or took any part in the decision.

Even if it be assumed, despite the absence of supporting evidence, that this 1956 discussion took place in Mr. Horn's presence and within his hearing, and that he knew that the manufacturers were agreeing to fix prices, that would still not suffice to prove Local 627 participation, absent evidence of actual "words or deeds" on the part of a representative of the Union. *United States* v. *Bentvena*, 319 F. 2d 916, 949, *cert. den'd* 375 U. S. 940; *United States* v. *Russano*, 257 F. 2d 712, 713; *Patterson* v. *United States*, 222 Fed. 599, 631, *cert. den'd* 238 U. S. 635. Participation in a conspiracy cannot be inferred from mere knowledge or acquiescence. *United States* v. *Direct Sales Co.*, 40 F. Supp. 917, *aff'd* 319 U. S. 703, 713, even if the knowledge is acquired through presence at the conspiratorial meetings themselves. *United States* v. *DiRe*, 332 U. S. 581; *United States* v. *Webb*, 359 F. 2d 558, 562, *cert. den'd* 385 U. S. 824; *Dennis* v. *United States*, 302 F. 2d 5; *Cleaver* v. *United States*, 238 F. 2d 766, 771.

CONCLUSION

For all the foregoing reasons, and for those set forth in the Jurisdictional Statement, the motion to affirm should be denied.

Respectfully submitted,

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APPENDIX "A"

Hearings before Committee on Ways and Means, House of Representatives, 81st Cong., 1st Sess. H.R. 2893, p. 2092

Statement of Morris Horn, Business Manager of Provision Salesmen and Distributors Union, Local 627, Amalgamated Meat Cutters and Butcher Workmen of North America

Mr. HORN. I speak in behalf of thousands of workingmen throughout the country who are suffering gross inequities at the hands of their employers and the Federal Government.

Officially, I speak as business manager of the Provision Salesmen and Distributors Union, local 627, and as special international representative of its parent organization, the Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., whose total membership is more than 200,000 persons.

But the victimized workers whose case I will plead here are of a number extending far beyond the jurisdiction of this or any other single union. They are to be found not only in the provision and meat industries, but in all fields such as processed foods, laundry, milk, bakery, soft and alcoholic beverages—in short, virtually every industry in which delivery is an element.

These men are called agent-drivers. They are employees, yet they are denied all benefits of social security and unemployment compensation. I am here to seek your help in correcting this deplorable condition. Here are the facts:

That classification of agent-driver was invented by employers upon the enactment of the Federal Social Security Act and the various State unemployment insurance laws.

Appendix "A"

It was designed as a clever subterfuge by which employers could avoid payment of Federal and State taxes required under this social legislation. And because of the Government's apparent willingness to condone such a ruse, the plan has worked splendidly.

For employers, the process of converting some or all of their regular route salesmen into the hybrid agent-driver bracket was simply a matter of taking the driver off the pay roll and putting his income solely on a commission basis. Some employers went further and required the driver to purchase his own truck; others did not. In all cases, the new method was to sell merchandise directly to the driver, letting him keep as his commission the difference between that price and the price at which he sold the goods. Most companies kept a small staff of delivery salesmen on a regular basic salary, while at the same time retaining a number of these so-called independent, or agent-drivers.

Defenders of the system might argue that the agent-drivers like it that way. They don't, for as it works out in actual practice, the agent-drivers' earning capacity is no greater—and often a good deal less—than that of salaried salesmen who perform the same duties.

The agent-driver's truck, whether owned by himself or his employer, is usually emblazoned with the company's or the product's name. Having bought merchandise from his boss, who may paint a rosy picture of the huge profits that lie ahead, he finds that, quite logically, the competition of regular drivers has made it impossible for him to earn more than, at the very best, a commission of roughly 6 percent. In the provision industry, he is lucky if he clears $65 at the end of a week's work. The regular driver-salesman, meanwhile, has delivered his merchandise at a flat 3-percent commission, to which is added a basic salary

of some $45. His take-home pay averages $75 a week or better, and conditions in other industries follow the same pattern.

Both men, remember, do exactly the same type of work. Yet, if the regular driver loses his job, he draws unemployment compensation. The agent-driver in similar straits is out of luck, and when the regular driver reaches the age of 65, he collects social-security payments. The agent, ineligible, is out of luck again. Very often he becomes a public charge, dependent upon charities for his very survival.

Every day, more and more salesmen on fixed salaries are being reclassified into this unfair work category. How can they then be called independent businessmen? Does this reclassification make their livelihood any less dependent upon the company whose products they sell? They are employees in every practical sense of the word.

They are, indeed, victimized—by employers who have used them as tools for tax evasion and by a Government that has apparently closed its eyes to their plight.

And the employer who uses this agent-driver delivery system runs a constant risk in that he relinquishes all responsibility for his product upon selling it to the driver. It would seem, then, that from the standpoint of management as well as labor, deliveries by salaried salesmen are necessary as insurance that business will be kept on a sound and healthy basis.

Through the years, various State courts have recognized these men as employees for purposes of collective-bargaining agreements, and a few States, Georgia, for instance, have gone further and included agent laundry drivers under State unemployment compensation laws. (*Brewster* v. *Hewitt,* 69 Ga. App. 593, 26 S. E. (2d) 198), Georgia, I

believe, gives them social-security coverage as well, but in many other States—too many—they are granted no recognition at all.

In some instances, test cases have been made for individual agent-drivers before the social-security agencies, but this has required so much litigation through the various courts, that most of the cases have eventually been dropped by the claimant for lack of funds. Even in the few instances where such a claim has been recognized and the inequity corrected, the ruling has benefited only the individual involved.

Finally, in various decisions—the details of which are stated in a brief to be filed following this testimony—the United States Supreme Court has ruled that agent-drivers are employees. (*Milk Wagon-Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.,* 311 U.S. 91, 98.)

This was also the court's decision in the case regarding newsboys, (*Cronicle Publishing Co.* v. *United States* D. C. U. S., No. Dist. of Calif., 70 Fed. Supp. 666, affd. Per Curiam June 23, 1948), but the Eightieth Congress reversed that stand with the passage of Public Law No. 492, the so-called news venders bill (H. R. 5052), which has denied them social-security coverage.

This law will apply to all agent-drivers unless Congress acts to protect them with specific provisions in the bill which is now before this committee.

In behalf of the members of my own union and the hundreds of thousands of other workers affected by this legislation, I would impress upon you now the vital necessity of correcting a flagrant injustice.

Should the committee decide that agent-drivers are independent businessmen, that decision would be unfair—not only to the workers themselves, but to those competing

employers who have staunchly assumed their obligations and retained a staff of regular route salesmen alone, instead of taking the easy way out from under a tax burden.

I would remind you again, that such a decision would be contrary to a number of rulings by State and Federal courts which have held these men to be—as indeed they are—workers.

This is not a plea for any special privilege. It is an appeal for fairness and simple equity, as opposed to a malignant denial of human rights. It is voiced in the interests of men who dislike being second-class citizens—men with uncertain futures, with wives and children to support, whose economic security hangs in the balance.

I would like, Mr. Chairman, at this time, to add a very brief additional statement.

The CHAIRMAN. You may proceed.

Mr. HORN. At this time I wish to call the committee's attention, if I may, to this fact: that in the extension of benefits in the proposed measure to salesmen, in the general category of salesmen, there should be expressly included agent-drivers and commission-drivers. This would avoid needless and costly litigation for purposes of interpretation by the courts as to what the term "salesmen" was intended to include.

The CHAIRMAN. We thank you very much for your statement, Mr. Horn.